(29,987)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 677

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1923

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. B-235

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY

vs.

THE UNITED STATES OF AMERICA and JAMES C. DAVIS, Director General of Railroads

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I. HISTORY OF PROCEEDINGS

On October 11, 1922, the plaintiff filed its original petition.

On December 9, 1922, the defendant filed a demurrer to said petition.

On April 9, 1923, the demurrer was argued by Mr. Sidney F. Andrews, for the defendant, and by Mr. S. S. Ashbaugh, for the plaintiff.

On April 30, 1923, the court entered the following order and memorandum:

ORDER SUSTAINING DEMURRER

This cause coming on to be heard was submitted upon the demurrer to the petition and was argued by counsel. On consideration whereof the court is of opinion that the demurrer is well taken.

It is therefore adjudged and ordered that the defendant's demurrer be, and the same is hereby, sustained, and the petition is dismissed.

MEMORANDUM

The Court's conclusion is based upon the considerations:

(1) That the jurisdiction of the Court of Claims in cases such as this is conferred by section 3 of the Federal control act, 40 Stat. 451. It provides for action by a board of referees and authorizes an agreement by the President with the carrier, and "failing such agreement" suit may be brought to determine the amount of just compensation. In the suit thus authorized the report of the referees is prima facie evidence of the amount of compensation and for the facts stated therein. The facts averred in the petition fail to show that the condition precedent contemplated by the statute has been complied with so as to bring the case within the jurisdiction of this court.

(2) That if the court have jurisdiction, the agreement, Exhibit A to the petition, concludes any rights the plaintiff might otherwise have.

[fol. 2] II. AMENDED PETITION—Filed June 7, 1923, by leave of court

Comes now the plaintiff, the Cairo, Truman & Southern Railroad Company, and for cause of action alleges:

1. That the Cairo Truman & Southern Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Arkansas, and as such corporation has for a long time been and now is engaged in business as a common carrier of freight and passengers for hire, both in the State of Arkansas and as [fol. 3] interstate commerce, and at all times hereinafter mentioned was so engaged in intrastate and interstate commerce with its office and principal place of business at St. Louis, Missouri, and that during the first six months of the period of Federal control it connected with the rails of the St. Louis-San Francisco Railway Company, then under Federal control.

That said James C. Davis is now the duly appointed, qualified, and acting Director General of Railroads, and as such is made a party defendant herein.

2. That under the power granted by the act of Congress approved August 29, 1916, the President of the United States on December 26, 1917, issued his proclamation and thereby took possession and control of the railroads of the United States, including this plaintiff and all its transportation facilities and business, for the purpose of more effectually prosecuting the war with Germany, and immediately appointed a Director General of Railroads, who took possession and control of the plaintiff, its railroad facilities and business, and operated the same down to and including the 29th day of June, 1918. That the issuing of said proclamation, the taking possession and control of said railroads and of this plaintiff, the appointment of said Director General of Railroads and his operation and control thereof, were all approved by the Act of Congress of March 21, 1918, known as the Federal Control Act.

That on the 29th day of June, 1918, the Director General of Railroads issued a relinquishment notice to the plaintiff in this case, whereby he pretended to relinquish the possession and control of this plaintiff, its railroad facilities and business, which said [fol. 4] notice was received by this plaintiff on or about the 1st day of July, 1918, and whether said notice was valid or void in law, the said plaintiff on said 1st day of July acted upon the same as legal and binding, and thereafter and from and including said 1st day of July, 1918, the officers of said plaintiff operated the railroad of the plaintiff in accordance with the provisions of the Federal Control Act, and the further provisions of Section 204 of the Transportation Act approved February 28, 1920.

3. That under and by virtue of the proclamation and order of the President so issued and made effective on January 1, 1918, this plaintiff, and all its railroad facilities and business, its income, receipts,

expenses of operation and control, became and were under the direct orders of the Director General of Railroads, and all were so operated in accordance with the proclamation of the President and the several provisions of the law applicable thereto, and the defendants became liable for the operation and control thereof, for the cost and maintenance of said operation and control, from January 1 to July 1, 1918, as provided by the Federal Control Act; and that the plaintiff and the President of the United States were unable to agree upon the compensation to be paid the plaintiff for the use of its property, franchises and railroad facilities, and have since been unable to agree thereon, and have not at any time made any agreement touching the same.

That ever since the 1st day of March, 1920, when the period of Federal control ceased by operation of law, the Director General has refused to acknowledge and has denied his liability for the operation and control of the plaintiff's railroad, its facilities and business, [fol. 5] during said six months from January 1 to July 1, 1918, and has refused to pay the costs and expenses of operation thereof, and to pay any compensation accruing to this plaintiff by virtue of the operation and control of its lines and business during said period of six months, and still refuses to acknowledge his liability and to pay the costs of operation or any loss sustained thereby, and to pay this plaintiff any rental or compensation for the use, operation and control of said railroad, its business and its property, during said period so designated.

4. That pretending to act under and by virtue of the proclamation so issued by the President, and by virtue of the provisions of the Federal Control Act, and by virtue of his own authority, more completely to control the business theretofore conducted by said plaintiff, and more completely to control and direct the business of this plaintiff, and to transfer the same to other lines of railroad then under his control and operation, the Director General by virtue of his power and influence over the business of the plaintiff operated in connection with lines of railroad then in his operation and control, advised and in effect forced and compelled this plaintiff to accept and sign a contract, then known as a per diem contract for short line railroads, under date of September 10, 1919, a full, true, and correct copy of which contract is hereto attached, marked Exhibit A, and made a part hereof.

That said contract was arranged, drawn and constructed entirely by the Director General, and contained such provisions as he demanded, and did not express a fair and equal agreement on the part of this plaintiff. That the same was not signed by the Director [fol. 6] General, or by anyone for him, but was accepted by the officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General, and was signed for this purpose only and not otherwise, and for the supposed concessions set out in the contract itself.

That said contract was entirely unilateral, and was without any consideration whatever, granted by the Director General to and for the use of the plaintiff, and that all the pretended rights, privileges,

and conveniences supposed to be granted by the Director General to the plaintiff, were then the rights, privileges, and conveniences of the plaintiff granted to it by law. That the plaintiff gained nothing by the execution and acceptance of this contract, and by it lost no rights whatsoever.

That the whole of said contract always was, and now is, wholly null and void, for the reason that the same was prepared and demanded by the Director General without any power or authority so to do, and is in direct violation of law then in full force and effect, and attempted to create a relation already created by law, and different than what was provided therein; that no consideration was created therein or intended to be created therein for the use and benefit of the plaintiff and that no reference was made in said contract or intended to be made in said contract to the right of this plaintiff to recover from the United States and the Director General its cost of operation during said six months from January 1 to July 1, 1918, when said plaintiff and its railroad were under the control and operation of the Director General, and to recover any and all depreciation in property because of said use and operations during said period, and to recover a just compensation for the use and operation of [fol. 7] said railroad and all of its equipment during said period as guaranteed to it by law.

That said contract was in nowise and to no extent a waiver of its rights to recover from the United States and the Director General its expenses of operation, its loss in depreciation, and its just compensation above mentioned, and in the signing of said contract by the officers of the plaintiff, no intent was recorded that they accepted the terms of the contract as a waiver of said right in any way or to any extent whatsoever.

It is apparent from the contract that its provisions were prospective and applied solely from and after the date of relinquishment and were not to apply in anywise to the period of control from January 1 to July 1, 1918.

5. That during said period of six months from January 1 to July 1, 1918, because of the control and operation of said railroad and its properties, and because of the control and diversion of its traffic and business by the Director General, the plaintiff sustained a loss or deficit in its operating income in not less than the sum of $6,908.40, which the Director General has refused to pay or reimburse.

That during said period and because of said control and operation the plaintiff has sustained a further loss in the under maintenance of equipment and by reason of the failure of the Director General adequately to provide for the repairs and renewals of road and stock and equipment in the sum of $3,350.40, which has not been repaid.

That during said period the plaintiff has suffered a further loss by reason of the failure of the Director General adequately to provide for the maintenance of structures and right of way in the further [fol. 8] sum of $5,360, which has not been repaid.

That during said period the plaintiff has suffered a further loss by reason of the failure of the Director General to supply the necessary materials used in the operation of said lines of railroad in the sum of $13,957.14, which has not been repaid.

That the several amounts above enumerated are justly due the plaintiff, and that due demand was made for the same on the President and the Director General; but that the President and the Director General, although often solicited so to do, failed to agree with the plaintiff upon the amount of reimbursement so claimed to be due, and failed to agree upon any amount whatsoever as just compensation because of the taking, control and operation of said property, as alleged, and refused and still refuses to pay any amount whatsoever for said losses, as above demanded.

6. That after the Director General had so refused to pay said claims or any part thereof, the plaintiff applied to the Interstate Commerce Commission for the appointment of a Board of Referees, as provided by law, which application was granted, and a Board of Referees of three members was duly appointed, before whom this plaintiff duly presented its claim, as above set forth; that said Board of Referees duly heard said claim, and on June 14, 1922, decided the same and rejected the demands of the plaintiff. A full, true and correct copy of said decision as promulgated by said board is filed herewith as part of the files in this case, from which finding and decision the plaintiff now appeals to this court and asks that this appeal be heard and decided as provided by law.

[fol. 9] That the plaintiff is the owner of said claim, and no assignment or transfer of said claim or any part thereof or interest therein has been made, and the plaintiff has at all times borne true allegiance to the Government of the United States.

Wherefore the plaintiff prays for a judgment in the sum of $29,575.94, and for such other and further relief as is provided by law.

S. S. Ashbaugh, Attorney for Plaintiff. G. B. Webster, Of Counsel.

Jurat showing the foregoing was duly sworn to by F. S. Charlot omitted in printing.

[fol. 10] EXHIBIT A TO AMENDED PETITION

Whereas the railroad of the Cairo, Truman and Southern Railroad Company, a corporation of the State (a) of Arkansas, with main line extending from Truman, Arkansas, to Weona, Arkansas, has been relinquished from Federal control; and

Whereas the said Railroad Company has elected not to enter into the standard co-operative short-line contract with the Director General of Railroads, but is desirous of obtaining the special advantages of two days' free time or reclaim allowance on cars, and such other co-operation as may be accorded to it by the Director General in

pursuance of his general policy of co-operation toward short-line roads as announced by him;

Now, therefore, the said Railroad Company, in consideration of the premises, and of obtaining the advantages of the two days' free time or reclaim allowance and such other co-operation as is accorded to it by the Director General of Railroads, hereby agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights, at law or in equity, which it now has, or hereafter can have, against the United States, the President, the Director General of Railroads, or any agent or agency thereof, by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads, or any act of the President or of the Director General of Railroads: Provided, however, That nothing herein is intended to affect any claim said company may have against the United States for carrying the mails [fol. 11] or for other services rendered not pertaining to or based upon the Federal Control Act.

In witness whereof these presents have, on the 10th day of September, 1919, been duly signed, sealed, and delivered by the Cairo, Truman and Southern Railroad Company, by its president thereunto duly authorized, and its title of executing officer, corporate seal affixed, attested by its secretary.

Cairo, Truman and Southern Railroad Company. By F. S. Charlot, Its President (Title of Executing Officer). Attest: H. F. Nelson, Asst. Secretary. [Seal.]

[fol. 12] III. Demurrer to Amended Petition—Filed June 26, 1923

The United States of America and James C. Davis, Director General of Railroads, by the Attorney General of the United States, demurs to the amended petition filed herein upon the following grounds, to wit:

(1) Facts alleged in the amended petition do not constitute a cause of action within the jurisdiction of this court.

(2) Facts alleged in the amended petition do not show that the plaintiff is entitled to any relief as against the defendants or either of them.

(3) Facts alleged in the amended petition show a complete settlement and satisfaction of any and all claims plaintiff had or could have had against the United States or the Director General of Railroads under the Federal control act or on account of anything done or omitted to be done by the United States of America or the Director General of Railroads in respect to the matter set forth in plaintiff's amend*ws* petition.

(4) If, as alleged, the contract of settlement was executed by plaintiff under duress, or through fraud or mistake, plaintiff must first proceed in a court of equity to have same set aside before he

can proceed in this court to have ascertained the compensation, if any, he is entitled to.

Robert H. Lovett, Assistant Attorney General. Dwight E. Rorer, Attorney. A. A. McLaughlin, General Solicitor R. R. Administration. Sidney F. Andrews, General Attorney R. R. Administration.

[fol. 13] IV. Argument and Submission of Demurrer

On October 22, 1923, the demurrer to the amended petition was argued and submitted by Messrs. A. A. McLaughlin and S. F. Andrews, for the defendant, and by Mr. S. S. Ashbaugh, for the plaintiff.

V. Order Sustaining Demurrer—Entered November 5, 1923

This cause coming on to be heard upon the defendant's demurrer to the plaintiff's petition as amended, and the court being of opinion that the plaintiff is not entitled to recover doth hereby sustain said demurrer, and the plaintiff's petition as amended is dismissed. See Memorandum at the former hearing.

By the Court.

VI. Judgment of the Court—Entered Nov. 5, 1923

At a Court of Claims held in the City of Washington on the 5th day of November, A. D., 1923, judgment was ordered to be entered as follows:

This case was submitted upon defendant's demurrer to plaintiff's amended petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's amended petition be sustained, and that the amended petition be and the same is hereby dismissed.

By the Court.

[fol. 14] VII. Plaintiff's Application for Appeal—Filed Nov. 12, 1923

Comes now the plaintiff above named on this 12th day of November, 1923, and makes application for and gives notice of an appeal to the Supreme Court of the United States from the judgment heretofore entered herein on November 5, 1923, sustaining the defendant's demurrer to the plaintiff's amended petition and dismissing said amended petition.

S. S. Ashbaugh, Attorney for Plaintiff.

VIII. Order of Court Allowing Application for Appeal—Entered November 19, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 15] Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer to the amended petition; of the judgment of the court; of the plaintiff's application for appeal; of the order of the court allowing said application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twentieth day of November, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

Endorsed on cover: File No. 29,987. Court of Claims. Term No. 677. Cairo, Truman & Southern Railroad Company, appellant, vs. The United States of America and James C. Davis, Director General of Railroads. Filed December 3, 1923. File No. 29,987.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 230.

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY

vs.

THE UNITED STATES OF AMERICA AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF APPELLANT.

S. S. ASHBAUGH,
Attorney for Appellant.

G. B. WEBSTER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 230.

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY

vs.

THE UNITED STATES OF AMERICA AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an appeal from the Court of Claims sustaining a demurrer to the petition for the adjustment of losses sustained by the appellant during that portion of the period of Federal Control for the first six months of the year 1918,

when the appellant was under the control of the Director General of Railroads of the United States. An application had been made to the Interstate Commerce Commission for the settlement of the claim for the losses sustained by the appellant in the sum of $29,575.94, being the items set out in the complaint in Section 5 of the petition found on pages 4 and 5 of the Record.

Upon the petitions filed in the Court of Claims two hearings were had. At the first hearing the Court sustained a demurrer to the petition on the ground of lack of jurisdiction appearing in the allegations of the petition. No opinion was filed, but the Court entered the following memorandum:

> "The Court's conclusion is based upon the considerations:
>
> "(1) That the jurisdiction of the Court of Claims in cases such as this is conferred by section 3 of the Federal Control Act, 40 Stat. 451. It provides for action by a board of referees and authorizes an agreement by the President with the carrier, and 'failing such agreement' suit may be brought to determine the amount of just compensation. In the suit thus authorized the report of the referees is *prima facie* evidence of the amount of compensation and of the facts stated therein. The facts averred in the petition fail to show that the condition precedent contemplated by the statute has been complied with so as to bring the case within the jurisdiction of this Court.
>
> "(2) That if the Court have jurisdiction, the agreement, Exhibit A to the petition, concludes any rights the plaintiff might otherwise have."

In accordance with the rules of the Court an amended petition was filed complying as far as possible with the sug-

gestions of the Court in the memorandum. To this amended petition the defendants refiled their former demurrer. It appeared at the second hearing that the Court had sustained the first ground of demurrer at the former hearing because it was assumed by the Court that the order of the Board of Referees should have been referred to the Interstate Commerce Commission, and the appeal should be taken from the order of the Commission. When this, however, was corrected by introducing the statute showing that the appeal should be taken from the order of the Board of Referees, the Court directed the argument to proceed as to the meaning of the contract set out as an exhibit to the plaintiff's petitions. Upon the final argument at the second hearing the Court sustained the defendants' demurrer as shown by the order and judgment of the Court set out on page 7 of the Record. From this judgment sustaining the demurrer and dismissing the petition, the plaintiff duly appealed, which appeal was by the Court allowed, as shown on page 8 of the Record.

The case was filed in this Court on December 3, 1923, and is here for consideration.

Assignment of Error.

The Court below erred in sustaining the defendants' demurrer to the plaintiff's amended petition, and in dismissing said petition from the Court.

The Issue Involved.

Under the ruling of the Court below no issue as to the four items of losses sustained by the plaintiff as alleged in Section 5 of the petition set out on pages 4 and 5 of the Record.

is now before the Court, but the sole issue is as to the meaning of the contract set out as Exhibit "A" to the petitions and found beginning on page 5 of the Record.

Is this contract a receipt in full for all losses and damages sustained by the plaintiff as alleged in Section 5 of its petition? The said contract is a contract executed by the appellant in this action beginning on page 5 and ending on page 6 of the Record.

It is the contention of the appellant that this contract must be considered as a whole, must be all construed together, and that it in no wise referred to or included any item of loss or damage sustained by the plaintiff below and set out in Section 5 of the petition, but that the provisions of said contract were prospective and applied solely from and after the date of relinquishment. This is the exact allegation made in the petition in reference to the contract, and which allegations on demurrer are assumed to be true, and should have been taken into consideration by the Court below, and a trial held upon the validity of such losses and damages.

On the contrary it is held by the defendants that the contract is a receipt in full for all losses and damages sustained during the period of Federal control by the railroad company, and that such waiver prevents the appellant from the recovery of its losses and damages so set out in its petition.

The sole question, then, before this Court is the meaning and effect of this contract which the Court held to be an acknowledgment of payment in full, or a waiver of the losses and damages set out in Section 5 of the petition.

ARGUMENT.

I.

Jurisdiction of the Court Below.

It was alleged in the demurrer to the petition and to the amended petition that the Court below had no jurisdiction under the allegations contained in the petition. Anticipating that this claim may also be urged in this Court, some attention must be given to it, although the Court below at the second hearing overruled the first ground of demurrer, took jurisdiction of the case, and decided the demurrer on the ground that the petition did not allege facts sufficient to constitute a cause of action.

The jurisdiction of the Court below in this class of cases was conferred by the Federal Control Act of March 21, 1918, 40 Stat. 461, Paragraph 3115¾*a*, Compiled Statutes, 1918. Section 3 of this Act provides that claims against the Government growing out of the taking of the railroads for war purposes under the Act of August 29, 1916, 39 Stat. 645, might be settled by agreement between the President and the railroa ' company and payment might be made for such claims. This section further provides that if the President or the Director General, to whom the power to make such agreement had been given, shall fail to agree with the railroad company upon the validity or the amount of such claims, a Board of Referees shall be appointed by the Interstate Commerce Commission, which Board should hear the claims and report its findings to the parties.

The statute then specifically provides as follows:

> "Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

The petition properly alleged the nature of the claims; that the Director General failed to agree with the plaintiff as to the amount due; that the Interstate Commerce Commission had appointed a Board of Referees before whom the claim was presented; that the Board of Referees filed a report thereon dated June 14, 1922, and that by virtue of this finding the plaintiff filed its petition in the Court of Claims. No objection was made in the demurrer that all material allegations were not included in the petition, but it was alleged by the defendants that under the statute above quoted the Court had no jurisdiction of the subject matter of the claim because the Board of Referees failed to find any amount due the plaintiff.

It appeared from the argument of counsel for the defendants in support of this ground of the demurrer that if the Board of Referees had found any amount whatever due the plaintiff, then either party, or in fact both parties, might appeal to the Court of Claims for a hearing upon the report filed with the parties and upon the original claim filed before the Director General.

The Court below, however, it was learned at the second hearing, took the view that the report of the Board of Referees

should have been filed with the Interstate Commerce Commission, and the appeal taken from the refusal of the Commission to allow the claim. This, however, was not the statute, and it appeared at the second hearing that the first ground of the demurrer was not well taken. It was then assumed by the Court that whatever the finding of the Board of Referees might be, either party dissatisfied with such report might file their petition in the Court of Claims and demand a hearing thereon. The Court below did not take the view expressed by counsel for the defendants that if the Board of Referees found nothing due, that no appeal would lie to the Court of Claims. The Court did not take the view that if the Referees found a million dollars due the plaintiff, the Director General might appeal, but if the Board of Referees found that nothing was due then no appeal would lie under the same statute.

All of this, however, was corrected by the Court in taking jurisdiction of the case and sustaining the demurrer at the second hearing referred to. The statute is so plain that no further discussion need be entered into as to the jurisdiction of the Court below.

II.

Admissions on Demurrer.

It will be noticed by the Court that the claim under consideration was not within or growing out of the contract which was set out as an exhibit to the petition in the Court below. The claim is specifically set out in Section 5 of the petition beginning at the bottom of page 4 of the Record, and includes four items of loss and damage which it was alleged by the appellant should be settled by the Director General and about which no agreement was reached.

On page 4 of the Record it is alleged that the plaintiff sustained a loss during the period of Federal Control because of deficit in operating expenses in the sum of $6,908.40.

It is further alleged that there was a loss during the period of Federal Control because it was not provided with adequate repairs and renewals of road and stock and equipment in the sum of $3,350.40.

It is further alleged that there was a further loss during said period because it was not provided with proper maintenance of the ways and structures in the sum of $5,360.00.

It is alleged that there was a further loss by not furnishing the necessary materials used in the operation of the railroad during said period in the sum of $13,957.14.

The nature of the contract set out as an exhibit to the petition is described in Sections 1, 2, 3, and 4 of the petition beginning on page 2 of the Record, and after such description it is said in Section 4 of the petition, repeated on pages 3 and 4 of the Record,

> "That said contract was entirely unilateral, and was without any consideration whatever, granted by the Director General to and for the use of the plaintiff, and that all the pretended rights, privileges, and conveniences supposed to be granted by the Director General to the plaintiff, were then the rights, privileges, and conveniences of the plaintiff granted to it by law. That the plaintiff gained nothing by the execution and acceptance of this contract, and by it lost no rights whatsoever.
>
> "That said contract was in nowise and to no extent a waiver of its rights to recover from the United States and the Director General its expenses of op-

eration, its loss in depreciation, and its just compensation above mentioned, and in the signing of said contract by the officers of the plaintiff, no intent was recorded that they accept the terms of the contract as a waiver of said right in any way or to any extent whatsoever.

"It is apparent from the contract that its provisions were prospective and applied solely from and after the date of relinquishment and were not to apply in anywise to the period of control from January 1 to July 1, 1918."

It is thus shown that this action did not arise out of the contract or because of anything contained in it, but the contract was set out as an exhibit to the petition not as a part thereof, but merely for the purpose of showing to the Court that the cause of action set out in the petition, and the items of losses and damages set out in Section 5 thereof, were entirely independent of and arose outside of the contract itself, and to show to the Court that no provision contained in the contract referred to any of these losses or damages, and that the contract did not and could not apply to these losses and damages, and that the demurrer admitted that there was no consideration covering these losses and damages included in or even remotely referred to by the said contract.

Upon the demurrer the Court overlooked the fact that the claim was founded upon losses and damages not included in the contract, and overlooked the fact that this allegation of the petition expressly averred "That said contract was in nowise and to no extent a waiver of its rights to recover from the United States and the Director General its expenses of operation, its loss in depreciation, and its just compensation

above mentioned, and in the signing of said contract by the officers of the plaintiff, no intent was recorded that they accepted the terms of the contract as a waiver of said right in any way or to any extent whatsoever. It is apparent from the contract that its provisions were prospective and applied solely from and after the date of relinquishment and were not to apply in anywise to the period of control from January 1 to July 1, 1918." The demurrer admitted this fact, and the Court erred in applying to such a claim so specifically plead an allegation in an outside document which was made an exhibit to the petition for the sole purpose of showing that the claims sued on were not included within the contract. The Court below should have heard the testimony upon the claim sued on, and then if the defendants had been able to prove that the items in the claim had been at some time, and somehow, and for some amount, settled and paid for, then the Court might on final hearing have rendered judgment in favor of the defendants. But on the petition containing the allegations above set out the Court erred in applying a contract covering other things and other items and which contract it is admitted by the demurrer did not include the items in suit and which were not referred to in any provision in the contract.

III.

The Nature of the Contract.

The contract which the Court below construed to be a settlement of the claims set out in the petition is on pages 5 and 6 of the Record.

Whatever may have been the view of the Director General, the decision of this Court in the case of the *Northern Pacific Railway Company et al. vs. North Dakota,* 250 U. S. 135, forever settled the question that these roads were taken under Federal Control and were subject to the constitution and the laws made and in force under such conditions. The plaintiff is entitled to recover from the defendants, the United States and the Director General, for losses and damages during the period of Federal Control, January 1 to July 1, 1918, the date of relinquishment, unless barred from such recovery by the so-called contract referred to above.

According to the tenor of said contract the plaintiff in consideration of obtaining the two days free time or reclaim allowance and such other co-operation as may be accorded to it by the Director General, executed the pretended waiver and contract which the defendants claim bars the right of recovery in this case.

This contract is entirely unilateral and without any consideration or benefit to the plaintiff whatsoever; all the pretended rights, privileges and conveniences supposed to be granted by the Director General to the plaintiff were then the rights, privileges and conveniences of the plaintiff granted to it by law, and the relation attempted to be created by said contract was a relation already created by law. There is no intent recorded in the said instrument that the officers of the plaintiff in signing the same accepted the terms as a waiver of the right to recover for the items of loss and damage set out in Section 5 of the petition in any way or to any extent. The items sued on in this action are in no wise connected with the subject matter of the contract set out as Exhibit A. They are not included within the terms or even within the purview of this contract.

IV.

The Date of the Contract.

The notice of relinquishment from Federal Control was received and acted upon by the plaintiff July 1, 1918. Thereafter from and including the said 1st day of July, 1918, the officers of said plaintiff operated the railroad of the plaintiff separate and independent of the provisions of the Federal Control Act, and the further provisions of Section 204 of the Transportation Act approved February 28, 1920. The contract set out in the petition as Exhibit A was executed by the plaintiff September 10, 1919, and no reference is contained therein to the claims of the plaintiff for losses and damage arising during the six months period of Federal Control; no intent was recorded that in signing the said contract the officers of the plaintiff accepted its terms as a waiver of the right of recovery on such claims in any way or to any extent. The claims referred to and included within the proposed terms and purview of the said contract cannot be construed to be those claims arising or that might have arisen under the provisions of the Control Act and of the Transportation Act, under which the plaintiff was operated prior to the date of relinquishment, July 1, 1918. Furthermore, the contract and the provisions therein cannot be made retroactive unless specifically provided for in that instrument. It is apparent that the provisions of the contract executed September 10, 1919, were prospective and applied solely from and after the date of execution and were not to apply in anywise to the period of control from January 1 to July 1, 1918.

Under the most drastic construction of the contract made by the Director General the plaintiff is entitled to judgment on the several items set out in the petition for the period from January 1 to July 1, 1918.

V.

The Real Purposes of the Contract.

It is to be remembered that the railroads of the United States, including the plaintiff below, were taken under Federal Control finally on January 1, 1918, for the purpose of aiding in the prosecution of the war then being waged. Of course, as they were taken for public use, the Fifth Amendment to the Constitution and all the laws then on the statute book and those which were subsequently passed in aid of this purpose, should all be applied. It is admitted in the pleadings that this railroad was taken under Federal Control and that a notice of relinquishment from such control was issued by the Director General on June 25, 1918. This notice of relinquishment in itself may have been entirely void because it was in violation of Section 1 of the Federal Control Act. But these matters may be entirely disregarded because the railroad company did upon receipt of the notice of relinquishment resume control and operation of its own railroad, and the further provisions of the Transportation Act of March 21, 1920, were applied so far as the same were applicable.

The Director General in his report to the 67th Congress, 4th Session, in House Document No. 546, on page 5, in regard to short line railroads, says:

> "There are some 855 short-line railroads in the United States. The Railroad Administration did not take over the actual operation of these properties, and prior to June 30, 1918, they were formally relinquished from any question of constructive Federal control."

The question of actual control of these 855 short line railroads is no longer a matter of doubt, as the question has been settled by numerous decisions of the Interstate Commerce Commission and by a long line of settlements made to the different railroads in accordance with those decisions. The sole question, therefore, now to be considered is as to the liability of the Director General for the losses and damages and compensation set out in the petition of the plaintiff as affected by the contract, if the contract or any of its provisions can be applied to the claim set out in the petition.

In order to determine this question the contract itself must be taken into consideration. The vagueness, generality and ineffectiveness of the contract itself indicate very plainly the doubt and uncertainty of the Director General, when he drafted the contract as alleged in the petition and admitted by the demurrer. The only apparent purpose in drafting the contract is that of assuring the railroads of the two days free time for loading and unloading, which provision did not give the railroad anything that it did not then possess.

The contract apparently attempts to provide that for such assurance or privilege the plaintiff could not recover any losses or claims arising in law or equity against the Director General under the Federal Control Act.

The very statement of those provisions shows that no general language in the contract can be construed as a receipt in

full or as a general waiver because the contract shows on its face not only that it was executed some 15 months after the plaintiff was relinquished from Federal control, but there is no language therein which would permit of its having a retroactive effect, the application of the language used therein being wholly prospective; and it is specifically provided that it was "not intended to affect any claim said company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act."

The contract then begins only on September 10, 1919, and was not intended by its very terms and conditions to apply to the period between January 1 and July 1, 1918, and indeed could not have applied to that period.

The whole amount of "full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity" mentioned in the contract, must be the exact claims and rights mentioned in the other provisions of the contract and to these only, and as the limitations of the contract as above set out are specifically mentioned, this language of the contract cannot be applied to the items of loss and damage and compensation sued on in the plaintiff's petition.

VI.

Trunk Line Contracts.

This view of the contract set out as an exhibit to the petition below is fully sustained by a consideration of the trunk line contracts made under the same law by the Director General at the same time and for the same purposes, which

trunk line contract is set out fully beginning at page 39 of the Public Acts and Proclamations of the President relating to the United States Railroad Administration under date of December 31, 1918, where Section 5 is inserted providing for "upkeep" and where Section 7 is inserted providing for "compensation." Here it is specifically provided that for the trunk lines these items were within the contracts and due terms of settlement were used. This is fully shown in Section 3 of the trunk line contracts, which particularly corresponds to the third paragraph of the short line contracts, but it is significant that while the short line contract contains no reference to compensation or claims for losses and damages, as set out in the petition, yet under Section 3 of the trunk line contract in order to provide for the settlement of "upkeep" and "compensation," one significant clause is inserted in the terms of the acceptance, which clause reads as follows:

> "* * * for compensation under the Constitution and laws of the United States for the taking possession of its property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to its business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

Here in the trunk line contract the Director General and trunk line railroads considered "upkeep" and "compensation," and in the receipt provided it is shown that when fully settled the receipt should include these items.

If the Director General under the trunk line contracts was to provide for the payment of "upkeep" and "com-

pensation," and agreed to do so, then on what ground the defendants can now say that the short line railroads and especially the appellant, could be taken for public use and no losses or damages or compensation be paid for such use, and how can the demurrer be sustained as to the petition of the plaintiff?

The Constitution does not say that if the trunk lines shall be taken for the public use just compensation should be made, but that if short line railroads are taken for the same use, no compensation need be made. No such distinction has been made by Congress and no such distinction has been authorized by law.

VII.

The Consideration in the Contract.

The contract set out as Exhibit A on pages 5 and 6 of the Record cannot bar the right to recover for the items of loss and damage set out in Section 5 of the petition, since the said contract is wholly null and void and without any force or effect whatsoever. For the purposes of this action the parties thereto are in exactly the same situation as though the contract had never been executed. It is alleged in the petition:

> "That said contract was entirely unilateral and was without any consideration whatever, granted by the Director General to and for the use of the plaintiff, and that all the pretended rights, privileges, and conveniences supposed to be granted by the Director General to the plaintiff, were then the rights, privileges, and conveniences of the plaintiff granted to

it by law. That the plaintiff gained nothing by the execution and acceptance of this contract, and by it lost no rights whatsoever."

The two days' free time or reclaim allowance privilege which is the pretended consideration granted to the plaintiff was already the privilege and advantage of the plaintiff by law and could constitute no consideration between the parties. The additional expressed consideration "such other consideration as may be accorded to it by the Director General," did not obligate or bind the Director General to do or cause to be done anything whatsoever and obviously cannot form the basis or consideration for a valid and operative contract. The Director General gave nothing according to the allegations of the petition, and appears on the face of the contract.

The instrument set out on page 5 of the Record as Exhibit A is *nudum pactum* and cannot operate to bar plaintiff from the recovery to which it is entitled under the law.

VIII.

An Unfounded Position.

The claim of the defendants that no recovery can be had because of the contract is entirely unfounded. There is no language of the contract which would authorize such a construction. Any such general language if taken separate and distinct from everything else would be open to construction by competent evidence, which evidence the Court denied the plaintiff when it was offered according to law. In view of the situation and intent of the parties and the facts

and circumstances existing at the time the said contract was executed this contract cannot be given the construction demanded by the defendants except in open defiance to all rules of law and to the apparent provisions of the contract themselves.

The position that the contract applies to any time before September 10, 1919, is untenable. Its provisions in any event could be prospective only and apply solely from and after the date of execution, and not in any way or to any extent to the control period during which the claims sued upon arose.

It cannot be contended that this contract bars the plaintiff's recovery for the items in this suit in view of the allegations in the petition that the contract was made and demanded wholly without any power or authority so to do and neither created nor intended to create any consideration for the use and benefit of the plaintiff; therefore, to apply it as a receipt in full or as a general waiver of the claims for losses, damages and compensation set out in the petition, is not only unfounded but absurd. The position, therefore, that this contract drawn as it was and for the purposes stated, without authority and without consideration, is a bar to the plaintiff's said right of recovery is not only unfounded and absurd, but is nothing less than untrustworthy. It is as illegal as it is unconscionable. We are not suing for an equitable right, but we are suing for a right guaranteed by the Constitution and based upon the Federal Control Act which was in itself not only legal, but most equitable. How the defendants could settle similar claims of the trunk lines and of the rest of the short lines and then deny a similar settlement to the number of short lines who signed

similar contracts, is a question which must be decided by the defendants themselves. Some reason must be given for this discrimination. The Court below rendered no reason and the defendants have indicated no reason excepting such as is conveyed by a misapplied construction of the general language of the contract. When this language is construed in the light of the circumstances and the situation of the parties, and it is apparent that the contract was made without power or authority so to do and is wholly without consideration, the position is rendered untenable.

IX.

No Legal Waiver.

When the contract is fairly considered it will be found that there is no legal waiver contained in its provisions applying to the four items set out in the claim of the plaintiff.

The law upon this question is well stated by the Supreme Court of the United States in the case of *Bennecke vs. Connecticut Mutual Life Insurance Co.*, 105 U. S. 355; 26 L., 990, as follows:

> "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule not only where there is a direct and precise agreement to waive the stipulation, but also where it is sought to deduce a waiver from the conduct of the party."

This definition has been approved so many times that it would be useless even to cite the cases where such approval has been made. A waiver is generally defined as "an inten-

tional relinquishment of a known right." 28 Am. & Eng. Enc. of Law, 527; 40 Cyc., 252.

The allegations of the petition deny that there was any intention on the part of the plaintiff to waive any of its known rights, and allege that no waiver of such rights was ever made, and these allegations again are admitted by the demurrer and are in nowise in conflict with the language of the contract. Under this rule of law and under the allegations of the petition there is no ground for the claim that any waiver of any right to the recovery of any loss or compensation for the period from January 1 to July 1, 1918, was ever made, and for this reason the demurrer should be overruled.

X.

The Contract of September 10, 1919, is Void on its Face.

The contract set out as Exhibit A of the petition cannot bar the plaintiff's right to recover for the items in suit, since it is absolutely null and void on its face. The said contract shows upon its face that the plaintiff was released from Federal control on June 30, 1918. The contract further shows upon its face that it was executed on September 10, 1919, 15 months after the said relinquishment. The contract therefore shows that the Director General, getting all of his power from the Federal Control Act had exercised all of that power in regard to that railroad and had released the same, which relinquishment had been accepted and acted upon by the plaintiff railroad company on or by July 1, 1918. Therefore the Director General had no authority whatever to make any kind of contract of the nature of the one in suit. The only thing that the Director Gen-

eral had legal power to do after the said date of relinquishment or July 1, 1918, was to settle any claims that may have arisen under the law during the period of control, and as he has refused to settle, he has no authority to act or even contract. The Director General today has as much power towards any or all roads taken under Federal control as he had over the plaintiff road when this contract was executed.

XI.

Construction of War Statutes.

The Act of Congress authorizing the President to take control and possession of the railroads was a war measure which was followed by the Federal Control Act applying retroactively to settlement of all claims on behalf of the railroads beginning on January 1, 1918. This Court has recently had occasion to construe such statutes passed for the same general purposes and in the case of *Houston Coal Co. vs. The United States,* 262 U. S. 361, Mr. Justice McReynolds says:

> "The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. As heretofore pointed out, *United States v. Pfitsch,* 256 U. S. 547, by deliberate purpose the different sections of the Act provide varying remedies for owners—some in the district courts and some in the Court of Claims.
>
> "It reasonably may be assumed that Congress in-

> tended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think, Section 10 should be so construed as to give the district courts jurisdiction of those controversies which arise directly out of requisitions authorized by that Section."

It has been heretofore fully discussed that this contract does not cover or apply to any of the items set out in the petition of the plaintiff. It has also been shown that no payment has been made for the loss described in those items and no compensation was given to the plaintiff for the first six months of the Federal Control period. The contract was entirely unilateral, and the petition specifically denies that any consideration whatsoever was given or intended to be given covering the waiver set out in the said contract, or authorized such waiver to be extended to the items set out in the petition of the plaintiff. The provisions of this contract were prospective and applied solely from and after the date of execution, and were not to apply in anywise to the period of control from January 1 to July 1, 1918, and said contract is absolutely void when attempted to be applied to the items of loss and compensation set out in the petition. No consideration was paid by the Director General for the items so set out, and none was ever received by the plaintiff, and no such construction was ever intended to be applied by the Director General or by the plaintiff.

Under the law, then, as quoted above, and under the facts admitted to be true, the contract does not cover the items

in suit, nor does it prevent the plaintiff from recovering thereon.

For these reasons the judgment of the Court of Claims in sustaining the demurrer and dismissing the petition should be reversed.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.

G. B. WEBSTER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 230.

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY

vs.

THE UNITED STATES OF AMERICA and JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

PETITION FOR REHEARING.

S. O. ASHBAUGH,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 230.

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY

vs.

THE UNITED STATES OF AMERICA AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

PETITION FOR REHEARING.

Comes now the appellant above named and respectfully presents this petition for a rehearing of this case, and further asks that the same may be set down for another argument at the same time as the argument to be presented to this Court in the case of the *Marion and Rye Valley Railroad Company vs. The United States,* number 991 of the present docket, as these cases grow out of the same transactions had with short-line railroads under the Federal Control Act, and that

it may be set for hearing at an early convenience of the Court.

Basis of Petition.

The petition in the case of the Cairo, Truman and Southern Railway Company, No. 230, is practically the same as the petition for rehearing in the case of the St. Louis, Kennett and Southeastern Railroad Company, No. 229. Reference is therefore had to the petition in that case and the statements there made are reaffirmed in this petition as far as the same may be applicable. The difference between the condition of the one suit and the condition in the other is practically immaterial, so that the petition in the one case may be used as the petition in the other.

One fact, however, appears in this suit which does not appear in the facts in the other. On May 19, 1921, the Interstate Commerce Commission settled the claims of the Cairo, Truman & Southern Railroad Co. for its losses during the last 20 months of the Federal Control period, and in settlement paid to that company the sum of $38,157.71, which amount was duly certified to the Treasury and the proper warrant was issued.

It appears from the record in this case that at the time of the settlement the Cairo, Truman and Southern Railroad Company had an outstanding contract, set out at page 5 of the record, which contract has now been construed to have been a receipt in full for

> "all claims and rights, at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General of Railroads or any agent or agency thereof, by virtue of

anything done or omitted pursuant to the acts of Congress relating to the Federal Control of railroads, or any act of the President or the Director General of Railroads."

This contract now having been construed as a receipt in full, of which there are about 100 in existence, and having been in the possession of the Interstate Commerce Commission at the time the payments were made, the question now becomes important as to the validity of this payment, and, if invalid, shall it be recovered back into the Treasury of the United States?

It is hardly possible to argue that a payment by the Government can be valid with a receipt in full on the desk of the payer. If that payment was authorized by Section 204 of the Transportation Act of 1920, then the contract cannot properly be construed as a receipt in full for the claims mentioned in the contract.

If this payment to the appellant is invalid and subject to a return to the Treasury, then every payment made to any short-line railroad which had a contract similar to the one in suit must also be invalid and subject to a return. This condition will subject all such railroads to the inevitable insolvency which would follow such repayment. This is not the purpose for which the Transportation Act of 1920 was passed by Congress. This is not the purpose for which the Interstate Commerce Commission made the settlement and for which the Treasury made the payment. This departmental construction, which applied to the payment above set out, is sufficient reason in itself for a rehearing of this case and a reconsideration of the original argument. The discrepancy between a receipt in full and a subsequent pay-

ment is so irreconcilable that in cases as important as the ones here presented some solution must be found, and this solution at the present time is a rehearing. An error, a mistake, was made in the construction of these contracts, which were never intended nor understood as containing a receipt in full for the claims subsequently settled by the Interstate Commerce Commission. This Commission could not have misunderstood the nature of these contracts in the hundreds of settlements already made. They are not paying claims with receipts in full in their possession. The only solution for this condition is a rehearing of the case.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.

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TABLE OF CASES

In the Supreme Court of the United States

OCTOBER TERM, 1924

CAIRO, TRUMAN & SOUTHERN RAILROAD Company, appellant

v.

THE UNITED STATES OF AMERICA AND James C. Davis, Director General of Railroads, appellees

No. 230

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF APPELLEES

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims, sustaining a demurrer to appellant's amended petition in a suit brought to recover for losses alleged to have been sustained by the appellant during the first six months of the year 1918, during which time it claims its railroad was in the possession of and being operated by the Government under Federal control. The plaintiff filed its original petition on October 11, 1922. A demurrer thereto was sustained on April 22, 1923.

Neither the original petition nor demurrer had been made a part of the record. (Record, page 1.)

The order sustaining the demurrer and memorandum setting forth the conclusions of the Court of Claims are set out on page 1 of the Record, and same show the demurrer was sustained generally on the grounds that petition failed to show jurisdiction in the Court and that assuming the Court to have jurisdiction, an agreement described as Exhibit A, attached to the petition, "concludes any rights the plaintiff might otherwise have." Amended petition was filed June 7, 1923, by leave of Court and is set forth on pages 2 to 6 of the record. The amended petition alleges that the appellant is a corporation organized under the laws of the State of Arkansas and for a long time has been engaged in business as a common carrier of freight and passengers for hire in said State and in interstate commerce, with its principal office in the city of St. Louis, and during the first six months of 1918 its railroad connected with the rails of the St. Louis-San Francisco Railway Company, then under Federal control; that James C. Davis is the duly appointed, qualified, and acting Director General of Railroads and as such is made a party defendant; that pursuant to authority of Congress appellant's railroad was taken into the possession of the Government under proclamation of the President dated December 26, 1917, and that the Government pursuant thereto operated said railroad and continued in possession thereof there-

after until June 29, 1918, upon which date notice of relinquishment by the Government was given to the appellant, and on July 1, 1918, it resumed possession and operation of its railroad.

The amended petition further alleges that the appellees became liable for the operation and control of said railroad and for the cost and maintenance of said operation and control from January 1st to July 1st, 1918, under the provisions of the Federal Control Act; that the appellant and the President were unable to agree upon the compensation to be paid the appellant for the use of its property and that no agreement has been made covering same; and that the Director General has refused to acknowledge and has denied liability in the premises and has refused to pay the cost and expense of operation during the period January 1 to July 1, 1918. Paragraph 4 of the amended petition is as follows:

> That pretending to act under and by virtue of the proclamation so issued by the President, and by virtue of the provisions of the Federal Control Act, and by virtue of his own authority, more completely to control the business theretofore conducted by said plaintiff, and more completely to control and direct the business of this plaintiff, and to transfer the same to other lines of railroad then under his control and operation, the Director General, by virtue of his power and influence over the business of the plaintiff operated in connection with lines

of railroad then in his operation and control, advised and in effect forced and compelled this plaintiff to accept and sign a contract, then known as a per diem contract for short line railroads, under date of September 10, 1919, a full, true, and correct copy of which contract is hereto attached, marked Exhibit A, and made a part hereof.

That said contract was arranged, drawn, and constructed entirely by the Director General, and contained such provisions as he demanded, and did not express a fair and equal agreement on the part of this plaintiff. That the same was not signed by the Director (fol. 6) General, or by anyone for him, but was accepted by the officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General, and was signed for this purpose only, and not otherwise, and for the supposed concessions set out in the contract itself.

That said contract was entirely unilateral, and was without any consideration whatever, granted by the Director General to and for the use of the plaintiff, and that all the pretended rights, privileges, and conveniences supposed to be granted by the Director General to the plaintiff were then the rights, privileges, and conveniences of the plaintiff granted to it by law. That the plaintiff gained nothing by the execution and acceptance of this contract, and by it lost no rights whatsoever.

That the whole of said contract always was, and now is, wholly null and void, for the reason that the same was prepared and demanded by the Director General without any power or authority so to do, and is in direct violation of law then in full force and effect, and attempted to create a relation already created by law, and different than what was provided therein; that no consideration was created therein or intended to be created therein for the use and benefit of the plaintiff and that no reference was made in said contract or intended to be made in said contract to the right of this plaintiff to recover from the United States and the Director General its cost of operation during said six months from January 1 to July 1, 1918, when said plaintiff and its railroad were under the control and operation of the Director General, and to recover any and all depreciation in property because of said use and operations during said period, and to recover a just compensation for the use and operation of (fol. 7) said railroad and all of its equipment during said period as guaranteed to it by law.

That said contract was in nowise and to no extent a waiver of its rights to recover from the United States and the Director General its expenses of operation, its loss in depreciation, and its just compensation above mentioned, and in the signing of said contract by the officers of the plaintiff, no intent was recorded that they accepted the

terms of the contract as a waiver of said right in any way or to any extent whatsoever.

It is apparent from the contract that its provisions were prospective and applied solely from and after the date of relinquishment and were not to apply in anywise to the period of control from January 1 to July 1, 1918.

In paragraph 5 of said amended petition (Record, page 4) appellant alleges that during the six months in controversy, because of the control and operation of its properties and because of the control and diversion of its traffic and business by the Director General, appellant sustained a deficit in its operating income which the Director General has refused to pay appellant; that during said period because of Federal control and operation appellant sustained a further loss on account of under-maintenance of its equipment by reason of the failure of the Director General to adequately provide for repairs and renewals, which loss has not been repaid; that during said period appellant suffered a further loss by reason of failure of the Director General to adequately provide for maintenance of structures and right of way, in an amount stated, which has not been repaid; that during said period appellant suffered a further loss, in an amount stated, by reason of failure of the Director General to supply necessary materials used in the operation of the railroad, which amount appellant

alleges has not been repaid, and the President and the Director General, though often solicited, have failed and refused, and still refuse, to pay to appellant.

In paragraph 6 of said amended petition (Record, page 5) appellant alleges that it applied to the Interstate Commerce Commission for appointment of a Board of Referees to fix its compensation and to determine its loss, as provided by Section 3 of the Federal Control Act; that the Board of Referees was appointed; that its said claims were presented to said Board of Referees, and on June 14, 1923, said Board rejected all of appellant's claims.

Attached to said amended petition is Exhibit A, referred to in paragraph 4 thereof, same being a copy of a contract entered into by the Director General and the appellant on September 10, 1919, which recites in part:

> Whereas the said Railroad Company has elected not to enter into the standard cooperative short-line contract with the Director General of Railroads, but is desirous of obtaining the special advantages of two days' free time or reclaim allowance on cars, and such other cooperation as may be accorded to it by the Director General in pursuance of his general policy of cooperation toward short-line roads as announced by him;
>
> Now, therefore, the said Railroad Company, in consideration of the premises, and

> of obtaining the advantages of the two days' free time or reclaim allowance and such other cooperation as is accorded to it by the Director General of Railroads, hereby agrees to accept the same in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which it now has, or hereafter can have, against the United States, the President, the Director General of Railroads, or any agent or agency thereof, by virtue of anything done or ommitted pursuant to the acts of Congress relating to the Federal control of Railroads: Provided, however, That nothing herein is intended to affect any claim said company may have against the United States for carrying the mails (fol. 11), or for other services rendered not pertaining to or based upon the Federal Control Act.
>
> (Record, pages 5 and 6.)

On June 26, 1923, the appellees demurred to said amended petition, the substance of said demurrer being first that the facts alleged did not constitute a cause of action within the jurisdiction of the Court of Claims, and second, that the facts alleged in the amended petition show a complete settlement and satisfaction of any and all claims plaintiff had or could have had, against the United States or the Director General of Railroads, under the Federal Control Act or on account of anything done or admitted to be done by the United States of America or the Director General of Railroads in respect to

the matters set forth in the amended petition, and that the facts alleged do not show the appellant is entitled to any relief as against the appellees, or either of them. (Record, page 6.)

On November 5, 1923, the demurrer was sustained generally and the petition dismissed. (Record, page 7.)

The sole question for consideration of this Court is whether the agreement made a part of the amended petition as Exhibit A, constitutes a full and complete settlement of the claims now presented by the appellant, and whether such agreement "concludes any rights the plaintiff might otherwise have."

ARGUMENT

I

The allegations of the amended petition show a full and complete settlement and satisfaction of all claims appellant had, or might have, against the United States, the President, or the Director General, on account of the alleged taking and using of its property by the Government during the time in controversy, and same including the claims now asserted

While there is grave doubt as to whether appellant's property was ever in the possession of, or operated by the United States within the meaning of the Federal Control Act, and whether appellant's property was taken by the Government in the sense of entitling appellant to compensation or damages, such matters are for the purposes of demurrer admitted. Assuming that appellant's

property was so taken and operated by the Government, it is conceded that the Government relinquished the property on June 29, 1918, as it had a right to do pursuant to the provisions of Section 14 of the Federal Control Act. All of the claims relate to the alleged taking, use, and operation between the dates January 1 and July 1, 1918. After appellant's property was relinquished by the Government, and on July 1, 1918, the appellant resumed the possession, use, and operation thereof, and continued therein during the balance of the Federal control period. On September 10, 1919, the agreement, made a part of amended petition as Exhibit " A," was executed and became effective. The language of such agreement is clear, definite, and comprehensive, and leaves in our judgment no room for construction, interpretation, or doubt. After reciting that the appellant had elected not to enter into the standard cooperative short-line contract tendered by the Director General, but that it

> is desirous of obtaining the *special advantages* of the two days' free time or reclaim allowance on cars, and such other cooperation as may be accorded to it by the Director General in pursuance of his general policy of cooperation toward short-line railroads."

The agreement provided:

> Now, therefore, the said railroad company in consideration of the premises, and of obtaining the advantages of the two days'

> free time or reclaim allowance and such other cooperation as is accorded to it by the Director General of Railroads, hereby agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights at law, or in equity, which it now has, or hereafter can have against the United States, the President, the Director General of Railroads, or any agent or agencies thereof *by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads, or any act of the President, or of the Director General of Railroads*: Provided, however, *That nothing herein is intended to affect any claim said company may have against the United States in carrying the mail, or for other services rendered not pertaining to or based upon the Federal Control Act.*

Appellant now contends that this agreement was not intended to cover and include the claims now asserted, or any claims accruing during the period January 1, to July 1, 1918, on account of possession, use and operation of its property by the Government, but that same was intended to include matters arising or accruing after July 1, 1918. Appellant further claims that the agreement is not binding upon it because precured by coercion, because unilateral and without consideration, and because the Director General was without authority or power to make the contract. We will consider such contentions in the order suggested.

A

The agreement of September 10, 1919, included and was intended to include settlement and satisfaction of claims now asserted by appellant

It must be remembered that appellant resumed possession of its property on July 1, 1918, and that the agreement involved was not executed until September 10, 1919, more than fourteen months after relinquishment by the Government, during which period appellant was in sole possession, use, and operation of the property without any interference from the Government. It must also be remembered that the contract provides:

> The said railroad company in consideration of the premises and of obtaining the advantages of the two days' free time or reclaim allowance * * * hereby agrees to accept the same in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law, or in equity, which it now has, or hereafter can have, against the United States, the President, the Director General of Railroads, or any agent or agencies thereof *by virtue of any thing done or omitted, pursuant to the acts of Congress relating to the Federal control of railroads, or any act of the President or of the Director General of Railroads.*

This language is clear and comprehensive. It includes—

> any and all claims and rights at law, or in equity, which it *now has,* or hereafter can

> have, * * * by virtue of anything done or omitted, pursuant to the acts of Congress relating to Federal control of railroads, or any act of the President or the Director General of Railroads.

There is no suggestion in the amended petition that the appellant had any claims against the United States or the Director General other than those accuring during the first six months of 1918 on account of alleged Federal control of its property, with the exception of certain claims which it took the precaution to protect and reserve from the operation of the agreement. It will be recalled the agreement, after reciting the claims and rights which were adjusted, settled, satisfied and discharged, continued:

> Provided, however, that nothing herein is intended to affect any claim said company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act.

This provision conclusively indicates that the appellant was alert in reserving from the operation of the agreement claims which it had against the United States which it did not intend to satisfy, settle, or discharge. Being alert in protecting itself and in reserving from the operation of the agreement its claims for carrying mails, and " for other services rendered not pertaining to or based upon the Federal Control Act," it must, we think,

be assumed that appellant did not intend to reserve and withhold from the operation of the agreement its claims now asserted on account of the alleged Federal control and operation of its property. Appellant knew that the Government had been in the possession, use and operation of its property. It must have known the effect thereof upon its revenues, and it must have known whether there had been a failure to properly maintain the equipment, structures and roadbed, or to supply the necessary materials for maintenance of the property, for it had been in the possession, use and operation thereof more than fourteen months after relinquishment by the Government before entering into the agreement in controversy. Under the facts alleged in the amended petition appellant cannot be heard to say that it did not know of such claims, or that it did not know of its right to recover from the Government on account of such matters, or that such claims are not clearly and conclusively within the description of the claims it acknowledged "adjustment, settlement, satisfaction and discharge" in consideration of the Director General continuing to it the "special advantage" of the two days' free time or reclaim allowance on his cars furnished appellant for use in the operation of its railroad. Appellant does not suggest there were any other claims in existence or contemplation when the agreement was made, to which same could attach. In argument appellant suggests the claims referred to must have been claims accruing after

the relinquishment of the property to the appellant, but the language of the agreement describes the claims settled, adjusted, satisfied and discharged as being all claims appellant—

> now has or hereafter can have against the United States * * * by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads, et cetera.

Are not the claims now asserted by virtue of something done pursuant to the acts of Congress relating to the Federal control of railroads? Is it not alleged that the possession, operation, and use of appellant's railroad by the Government was by virtue of the acts of Congress relating to Federal control of railroads? Was not the taking possession and the operation of the railroad something done pursuant to such acts of Congress? Was not the omission to properly maintain the property an omission pursuant to acts of Congress relating to Federal control of railroads? Was not the failure to pay compensation or damage resulting from the taking or to properly maintain the property an omission pursuant to acts of Congress relating to the Federal control of railroads? We think the claims now asserted could not have been more aptly described than by the language employed in the agreement in controversy. The claims that must have been uppermost in the minds of both the Director General and the appellant in making the agreement were the claims growing out of the

Federal control of appellant's property prior to the date of relinquishment, and the fact that the agreement reserved from its operation claims for carrying the mail, and for other services rendered not pertaining to or based upon Federal control, clearly demonstrates that the parties intended to adjust the claims growing out of Federal control, and since the Federal control of appellant's railroad is not claimed to have extended beyond July 1, 1918, it must follow that it was the clear intention of both parties that the claims now asserted should be adjusted, satisfied, and discharged in consideration of the two day's free time or reclaim allowance. If such claims were not included in the settlement, we inquire what did the Director General receive as consideration for continuing the two days' free time or reclaim allowance on cars. No other consideration is suggested by appellant, and the allegations of the amended petition clearly indicate there could be no other consideration. Unless the claims now asserted were claims satisfied and discharged by such agreement the Director General and the United States received a "gold brick" from the appellant in consideration of the very substantial benefits the Director General accorded to the appellant in continuing the two days' free time or reclaim allowance. Agreements of this character entered into by the Government are not to be lightly cast aside, or the benefits bargained for by the Government lightly frittered away by unwarranted interpretation or construction.

In the case of *United States* v. *William Cramp & Sons Company*, 206, U. S. 113–128, a receipt given for the final payment on contract price for constructing a war vessel recited that in consideration of the payment of $41,132.86, balance of a special reserve of $60,000.00, the William Cramp & Sons Company

> does hereby for itself and its successors and assigns and its legal representatives recognize, release, and forever discharge the United States of and from all, and all manner of debts, dues, sum, and sums of money, accounts, requirements, claims, and defenses whatsoever in law or in equity for or by reason of, or on account of the construction of said vessel under the contract aforesaid.

It was claimed by the company that this release did not cover claims for damages on account of delays or other matters attributable to the United States in connection with the work of constructing the vessel. In upholding the release as covering all such matters, although the question of damages was not considered in connection with its execution, the court said:

> Indeed the general language of the release itself and the number of words of description in it showed that it was the intention of the Secretary of the Navy to have a final closing of all matters arising under, or by virtue of the contract. *Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction.* The general language, all and all man-

> ner of debts, * * * indicates a purpose to make an ending of whatever matter arising under or by virtue of the contract. If parties intended to leave such things open and unsettled, their intent so to do *should be made manifest.* Here was a contract involving three millions of dollars, and after the war was done, the vessel delivered and accepted, and this release entered, claims are presented amounting to over $500,000.00. Surely the parties never intended to leave such a bulk of unsettled matters.

Paraphrasing the language of the court we say it was clearly the intent of the Director General to have a final closing of all matters arising out of the Federal control of appellant's railroad, for in the agreement suggested, in consideration of free time, it was expressly recited that in consideration of such special advantages and other anticipated benefits appellant

> agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights at law or in equity which it now has, or hereinafter can have against the United States * * * by virtue of anything done or omitted pursuant to the acts of Congress relating to the Federal control of railroads.

In view of such language, if appellant sought to reserve or leave open the claims now asserted, its "intent so to do should be made manifest." Appellant sought to leave open, and did leave open,

its claim for mail pay and for services rendered "not pertaining to or based upon the Federal Control Act." Instead of manifesting its intention that these claims should be held open, the language used clearly shows the claims were the very ones intended to be settled, the very matters the Director General intended "to have a final closing of," the very consideration for which he agreed to continue the two days' free time allowance on cars.

To permit appellant to now say these claims were not included would be to permit the violation of the elementary rule that the plain language of a written instrument cannot be varied or contradicted on the theory that a party thereto did not intend the clear and certain meaning thereof. We conclude the claims are covered, satisfied and discharged by the agreement, and that the demurrer was rightly sustained on such ground unless the agreement is vulnerable to some other objection urged by the appellant to be hereafter considered.

B

Appellant's claim of coercion

In paragraph 4 of the amended petition (Record, Page 3) appellant alleges that:

> The Director General by virtue of his power and influence over the business of plaintiff operating in connection with lines of railroad then in his operation, and control, advised and in effect forced and com-

> pelled this plaintiff to accept and sign a contract then known as a per diem contract for short-line railroads, under date of September 10, 1919. A full, true, and correct copy of such contract is hereto attached, marked Exhibit A, and made a part hereof.

Such language is a mere conclusion, does not state any facts upon which coercion could be found, and there is presented nothing which would permit a Court of Equity having jurisdiction to set aside the contract on the grounds of coercion. Such relief is not even asked and probably could not be granted by the Court of Claims in any event. The claim is abandoned in this Court. On the question of coercion, however, we call attention to the language of the agreement which recites:

> Whereas the said Railroad Company has elected not to enter into the standard, cooperation, short-line contract with the Director General of Railroads, but is desirous of obtaining the special advantages of two days' free time or reclaim allowance on cars and such other cooperation as may be accorded to it by the Director General in pursuance of his policy of cooperation toward short-line roads as announced by him.

This language clearly shows appellant was acting freely and elected to enter into this agreement instead of an agreement, which, so far as this record discloses, may have furnished many additional advantages, but it probably would not have been advantageous to the appellant of account of its pecul-

iar situation. If there was coercion, same was withstood by appellant for more than 14 months after its property was relinquished and the allegations of the amended petition justify the conclusion that the coercion was not of a character to justify interference of a Court of Equity. It may be the Director General declined to enter into a contract more advantageous to the appellant, but that fact does not constitute coercion that will void a contract freely entered into. We conclude the agreement is not to be set aside in this proceeding on the ground of coercion.

C

The agreement is not unilateral or invalid because not signed by the Director General

The agreement in question is not unilateral within the meaning of that term, but involves mutual promises and considerations. Appellant desired to obtain the " special advantages of 2 days' free time or reclaim allowance on cars " and to secure such " special advantages " executed an agreement which recites in substance that in consideration of obtaining the advantages of 2 days' free time or reclaim allowance and such other cooperation as the Director General might accord, the appellant " hereby agrees to accept the same in full adjustment, settlement, satisfaction and discharge of any and all claims and rights in law or in equity which it now has or hereafter can have against the United States, etc.," by virtue of anything done or

omitted pursuant to the acts of the Congress relating to Federal control of railroads.

The consideration moving from the Director General to the appellant was two days' free time or reclaim allowance on cars and such other cooperation as the Director General might accord the appellant, and the consideration moving from the appellant to the Director General was the adjustment, settlement, satisfaction and discharge of all claims and rights of the appellant against the Government on account of the Federal control and operation of its property during the first six months of 1918. There is no contention that appellant did not receive the 2 days' free time allowance in accordance with the contract, or that it did not in fact receive the consideration named therein. There is no rule of law more familiar than that a contract need not necessarily be in writing and signed by both parties. Unless within the statute of frauds a contract may be entirely oral, or it may be in part in writing and in part oral. It may be in the form of a written offer and an oral or implied acceptance, or an oral offer and acceptance in writing or by the acts of the party. A familiar illustration is a deed coveying land which provides that the grantee assumes and agrees to pay a certain indebtedness constituting an incumbrance on the land as a part of the purchase price. The deed is not signed by the grantee but the courts universally hold the grantee by accepting the deed becomes legally liable to the creditor. By accepting the

deed with such provision he enters into a contract to pay the indebtedness. The doctrine involved is elementary and we refrain from citation of authorities.

The agreement has been executed on the part of the Director General by continuing the free time allowance. Such free time allowance was granted in reliance upon the agreement. The agreement was executed on the part of the appellant at the time of its execution and delivery to the Director General, for the release and discharge was operative at once. In consideration of a present release and discharge of certain claims and rights appellant could assert against the Government, the Director General agreed to continue the free time allowance and thereafter fully performed his agreement. There was, therefore, no lack of mutuality.

The following cases support such conclusion:

Storm v. *United States,* 95 U. S. 76.
Mississippi River Logging Company v. *Robson,* 69 Fed. 775, C. C. 88 Circuit.
White & Wilson Manufacturing Company v. *Lyon,* 71 Fed. 374.
Mississippi Glass Company v. *Franson,* 143 Fed. 501–507.

In the latter case the Court, quoting from an opinion of the Supreme Court of Pennsylvania, said:

> Want of mutuality is no defense to either party except in cases of executory contracts.

> It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one the obligation was fulfilled, the contract was executed when it was made; as to the other party it remained executory. A consideration may be either something done or something to be done or a promise itself. When it is something already done it is idle to talk of want of mutuality. That is to be considered when the obligations of both parties are future.

We conclude, the agreement is not to be held inoperative because of want of mutuality or on the theory of being unilateral. The appellant has received the full consideration for which it bargained, and unless the agreement is bad for some other reason, must be enforced in behalf of the Government.

D

The consideration of the contract

The appellant alleges in paragraph 4 of the amended petition that the agreement was without consideration and that appellant gained nothing by the execution and acceptance of the agreement; that no consideration was created therein or intended to be created for the use and benefit of the appellant. In said paragraph, however, appellant states that the agreement "was accepted by the officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conven-

iences as were indicated by the Director General and was signed for this purpose only and not otherwise, and for the supposed concessions set out in the contract itself." This latter statement shows not only that appellant acted freely in entering into the agreement, but that it expected a benefit from the concession of the Director General. This benefit it has received. The main benefit was two days' free time in the use of the Director General's cars, while on its line of railroad. The fact that appellant was receiving such concession prior to the execution of the agreement does not make the concession any the less a consideration.

The appellant was bargaining for a continuance of a concession it already had, but which the Director General was not bound to continue. He could withdraw such concession and it is apparent from the language quoted from paragraph 4 of the amended petition that he was proposing to withdraw such concession unless the agreement should be executed and that appellant executed the agreement "for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General." In that sense the Director General may have been guilty of duress, but same did not constitute legal duress, as the Director General was not obligated to continue the concession, and in agreeing to continue the concession he had a right to demand a consideration from the appellant. The consideration demanded was the satisfaction and discharge of all claims

appellant might otherwise make on account of the Federal control and operation of its property. Whether the consideration was adequate will not be inquired into by this Court in view of the capacity of both parties to the contract. Whether the concession of two days' free time was fully adequate consideration might furnish just occasion for difference of opinion before the agreement was entered into. The value of such consideration would, of course, depend on how long the concession was to continue. When the agreement was made the time Federal control would continue was uncertain. If same should continue a period of years, as was possible, the consideration would be of greater value than it was in view of the fact that Federal control terminated March 1, 1920, nearly six months after the agreement was entered into. The appellant had the benefit of the consideration for nearly six months and the Court will, under the circumstances presented, not inquire into whether it made a good or a bad bargain. It is not seeking to set aside the agreement or to void it on the ground of inadequacy of consideration, but rather it alleges there was *no* consideration. The allegations of the amended petition show a consideration and the statements therein that there was no consideration constitute a mere conclusion which is overcome by the language of the agreement.

There was, therefore, a sufficient consideration shown in the amended petition for the execution of

the agreement and same cannot be avoided on the theory of lack of consideration.

E

The power of the Director General to make the agreement

In Section 10 of appellant's brief contention is made that the agreement is void on its face because the Director General had no power to make it, appellant bases such contention on the fact that its railroad has been relinquished, and in relinquishing same the Director General exhausted all of his rights and powers in reference to it. It will be recalled that Section 8, of the Federal Control Act provides that the President may execute any of the powers granted with relation to Federal control through such agencies as he may determine. The court takes jurisdictional notice of the proclamations of the President, and it will be recalled that the President by proclamation vested in the Director General all powers granted to him by the Federal Control Act, except the appointment of the Director General. If the President had power to make such a contract as that here involved, then the Director General had power to do so. That the Director General had power to make traffic or other appropriate agreements for handling traffic, cars, and the like, as between Federal and non-Federal lines must be conceded, as a matter of necessity. The agreement in question involves interchange of cars between the Director General and the appel-

lant and provides for two day's free time. If the property of appellant was under Federal control, Section 1, of the Federal Control Act authorized the President to agree with appellant as to its compensation for the use of its property, and fixed a maximum allowance, leaving the President to agree to make compensation for any amount, less than such maximum, he should think proper. In such contract he was authorized to make provision for maintenance, depreciation, retirements, and the like. There is nothing in the statute prohibiting the President from making compensation in something other than money, provided the appellant was willing to agree thereto. There was nothing in the statute prohibiting appellant from waiving compensation, and if its waiver was based on a good consideration, whether adequate or not, it would be bound thereby. This agreement is, we think, either an agreement for compensation measured by two day's free time on cars during the remainder of Federal control period, however long, or it was an agreement pursuant to which the appellant for a sufficient consideration waived compensation. Congress recognized the existence of such contracts in enacting the Transportation Act, 1920. In Section 203 of that act it is provided:

> Section 203. (a) Upon the request of any carrier entitled to just compensation under the Federal Control Act, but with which no contract fixing *or waiving compensation* has been made, and which has made *no waiver*

> *of compensation*, the President (1) shall pay to it as much of the amount he may determine to be just compensation as may be necessary to enable such carrier to have the sums required for interest, taxes, et cetera.

The thought we suggest is that Congress in authorizing the President to complete settlements with carriers under Federal control recognized that certain carriers had already made contacts for compensation, that certain other carriers had made contracts waiving compensation, and certain other carriers had made "waiver of compensation." Such carriers were excluded from the authority granted the President in Section 203. Such recognition shows Congress believed the President had authority to make contracts of this character. We think there can be no question but that the President had the power to make the contract. The same was made fairly. In such contract the appellant for a sufficient consideration acknowledged satisfaction and discharge of all claims now asserted. Appellant has received the consideration for which it bargained and must now abide by the terms of the agreement, and is precluded from any recovery in this suit.

In conclusion we say the agreement made a part of the amended petition as Exhibit A is a valid and binding agreement as between the parties and that same evidences a complete and final settlement, satisfaction and discharge of all claims of

appellant in this suit, and that appellant has received the consideration from the Director General therein bargained for, which consideration is adequate and such agreement concludes the appellant in respect to the claims presented, as well as any other claims it might have otherwise asserted. Appellant has retained the benefits of said agreement and cannot now be heard to assert it is not bound thereby. The demurrer was, in our judgment, properly sustained and we respectfully ask the judgment of the Court of Claims be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

SIDNEY F. ANDREWS,
A. A. MCLAUGHLIN,
Attorneys for Appellee.

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CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 230. Argued January 23, 1925.—Decided March 2, 1925.

1. An agreement between a railroad company and the Director General of Railroads for settlement and release of claims like the agreement in *St. Louis, etc. R. R. Co.* v. *United States, ante,* 346, considered and *held* within the authority of the Director General; and binding on the railroad, even if without consideration, it being under seal, and operative on the claim in question. P. 351.
2. Allegations *held* not sufficient to charge duress. P. 352.

58 Ct. Clms. 336 affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition on demurrer.

Mr. S. S. Ashbaugh, with whom *Mr. G. B. Webster* was on the brief, for appellant.

Mr. A. A. McLaughlin, with whom *Mr. Solicitor General Beck* and *Mr. Sidney F. Andrews* were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal from the judgment of the Court of Claims which dismissed the petition on demurrer. Plaintiff's claim is in character the same as that sued on in *St. Louis, Kennett & Southeastern R. R. Co.* v. *United States,* decided this day, *ante,* p. 346. It is presented in the same manner; and the Government makes the same defense. The provision for settlement and release of claims here relied upon is substantially the same as in that case. But, in other respects, the contract is entirely different. It is in the form, known as the *per diem* contract, which contains no operative provision other than that providing for settlement and release of claims. The rest of the document consists of recitals and the testimonium clause. The consideration for the settlement and release is therein stated to be "obtaining the advantages of the two days' free time or reclaim allowance and such other co-operation as is accorded to it by the Director General of Railroads."

The petition alleges that the Director General gave no more than he would have been obliged by law to give had no agreement been made. This is not true. But it is, in any event, without legal significance. The plaintiff's agreement embodying the release was under seal. Hence, it is binding even if without a consideration. The petition alleges, also, that the agreement "was accepted by the

officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General, and was signed for this purpose only and not otherwise, and for the supposed concessions set out in the contract itself." The allegation does not charge facts constituting legal duress. *United States* v. *Child & Co.*, 12 Wall. 232, 244. Nor is it claimed that the agreement is void because of duress.

As in the *St. Louis Company case*, the Director General clearly had authority to enter into the agreement in question.

Affirmed.